Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

LYLE D. SPENCER,

Petitioner,

vs.

MR. HAROLD LEE SPENCER
ATTORNEY SCOTT HILSTROM
FIRST AMERICAN STATE BANK
STATE JUDGE RONALD SCHECHTMAN,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this action for racketeering and civil rights violations, the U.S. District Court of Northern Iowa dismissed the Petition for failure to state a claim and entered a judgment in favor of the defendants. The Court of Appeals affirmed the District Court. The following questions are presented in this Petition.

1. Whether the Eighth Circuit erred in upholding the dismissal for failure to state a claim generally.

2. Whether the Eighth Circuit erred in upholding the issuance of immediate Protective Orders by the U.S. District Court for the Northern District of Iowa, for the four defendants was proper when this prevented free, liberal discovery that the use of illegal drugs and the transportation of these drugs across State and International borders was apparent.

3. Whether the Eighth Circuit erred in upholding and the District Court erred in dismissing the defendants Hillstrom and First American State Bank, when the defendants Hillstrom and First American State Bank were in default, having been served properly not once but twice, and the application for default judgment was filed pursuant to federal Rule of Civil Procedure 55(b)(1).

4. Whether the protection extended to judges under *Pierson v. Ray*, 386 U.S. 547, 553-555 (1967) extended to judges likes Defendant Schechtman who are alleged to violate a citizen's rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

PARTIES AND RULE 29.1 STATEMENT

All of the parties who participated below are set out in the caption.

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PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

Petitioner, Lyle Spencer, respectfully prays that a Writ of Certiorari issue to review the judgment and opinions of both U.S. District Court and the U.S. Appeals Court of the Eighth District concerning a RICO case against four Defendants and an additional charge against one of the four for violating the Petitioner's Constitutional Rights of free speech and due process.

OPINIONS BELOW

The opinions of the United States Court of Appeals and the United States District Court are contained in the Appendix pages 1a-19a.

JURISDICTION

Jurisdiction for the Complaint is proper under Title 28 U.S.C. 1331.

STATEMENT OF THE CASE

On June 2, 1993, a RICO and Civil Rights Violation Complaint was filed in U.S. District Court for the Northern District of Iowa. Four Defendants were named. They were Harold Spencer, Scranton, Iowa, Scott Hillstrom, Bloomington, Minnesota, First American State Bank, Fort Dodge, Iowa, and Judge Ronald Schechtman, Carroll,

Iowa. U.S. District Court Senior Judge Donald E. O'Brien was the presiding Judge and the Complaint was given the Number of C93-3039.

The first Ruling by U.S. District Court came down on April 1, 1994, dismissing the Complaint, (App. 2a), but because the Judge saw some merit in the case he ordered that all parties bear their own costs. A Ruling on a Motion to Reconsider was handed down on November 23, 1994, affirming the earlier Ruling. (App. 1a). The Case was then appealed to the Eighth Circuit Court in St. Louis, MO. On October 23, 1995, the Appeals Court affirmed. A Petition for Rehearing was filed to the Appeals Court. A final Ruling, dated November 20, 1995, denied the Rehearing.

ARGUMENT

A Motion to Dismiss says in effect, that the Petition on file is so weak that the defendants shouldn't even have to answer it, or otherwise deal with it; it should just be thrown out. In regards to this Petition, how weak are we talking about? Is it so weak that even if one ASSUMES that everything in the Petition is true, the Plaintiff still loses? Should one not understand that this is only an ASSUMPTION? (App. 50a & App. 52a), An assumption even when extortion and bribery can be proven?

> Determination of credibility or strength of evidence are outside of the complaint and relevant to the motion to dismiss. *U.S. v. All Right, Title and Interest in 5 Parcels of Real Property and the Appurtenances Thereto Known as 64 Lover's*

> *Lane* 830 F. Supp. 750 (1993) and *Nertzle v. Williams*, 490 U.S. 319, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989).

At this point we know nothing about the actual state of the case, and the judge is not entitled to rely upon any opinion he may have concerning the case. He may think it is the world's greatest case or the world's worst case or something in between. But all he can look at is the Petition in the case.

> Court of Appeals construes allegations of Complaint in light most favorable to plaintiff, and should not approve dismissal of Complaint unless it appears beyond doubt that there is no set of facts Plaintiff can prove in support of claim that would entitle him to relief. *Carney v. Houston*, 33 F.3d 893 (8th Cir., 1994).

This brings us up to the second statement, about it not mattering whether the court finds the Petition likely or believable, etc., – all the court looks at is the Petition in front of it, and it assumes it to be true.

> Complaints should be dismissed for failure to state a claim only where, taking all allegations of Complaint as true, and making all reasonable inferences in Plaintiff's favor, it appears beyond doubt that the Plaintiff can prove no set of facts in support of claim which would entitle him to relief; the standard is the same for RICO as for non-RICO cases. *Gurfein v. Sovereign Group*, 826 F. Supp. 890 (E.D. Penn. 1993)

The above brings us to what one needs to survive a Dismissal Motion. To survive a Dismissal Motion the Petitioner need only to plead the elements necessary to win the case if proved. For that one compares the Petition

to the statutes. If the Petition matches the statutes the case should survive the motion to dismiss, because they lay out a set of facts, which, if true, the Plaintiff will recover. FRCP 12 b states:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

This case was brought forth under the provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 (RICO) against Harold Spencer, Scott Hillstrom, First American State Bank, and Judge Ronald Schechtman, (App. 33a). The case carries an additional claim against Ronald Schechtman for violating the U.S. Constitutional Rights, Amendments I, V, and IV, of the Plaintiff. The claim is brought under 42 U.S.C. 1983.

The definition of 18 U.S.C. 1961(1) "racketeering activity means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion in dealing in narcotic or other danger drugs, which is chargeable under State law and punishable by imprisonment for more than one year, any act which is indictable under any of the following provisions of the 18 United States Code. For the purposes of this case the following sections are section 201 (relating to bribery), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1510 (relating to obstruction of justice), section 1511 (relating to obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), and section 1952 (relating to racketeering)."

Defendant Ronald Schechtman openly violated the U.S. Constitutional Rights of the Plaintiff and thus 42 U.S.C. 1983 becomes applicable. When U.S. District Court Judge Donald E. O'Brien ruled on April 1, 1994, that Judge Schechtman could be held for judicial misconduct (App. 16a) for his fraternizing from the bench with Justice/witness Iowa Supreme Court Justice David Harris, the Plaintiff's Constitutional Rights were sacrificed. Judge Schechtman sacrificed the Rights of the Plaintiff

again with his illegal ex parte rulings and threats. 42 U.S.C. 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or District of Columbia, subject, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in the action at law, suit in equity, or other proper proceeding for redress.

Defendant Schechtman is not above this law as ruled by U.S. District Court, claiming *Pierson v. Ray*, 386 U.S. 547, 553-555 (1967). Judge Schechtman claims that this law gives him the authority to violate a citizen's constitutional rights both corruptly and maliciously.

When Defendant Schechtman ruled in ex parte against the Plaintiff (App. 45a), he took away the Plaintiff's right to be heard in court, he took away the Plaintiff's freedom of speech. The First Amendment to the Constitution of the United States states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Defendant Schechtman violated the Plaintiff's right to the Fifth Amendment to the Constitution of the United States when he fraternized with the Justice/witness, not only from the bench during trial, but also when he also fraternized with the Justice just outside the courtroom

during breaks in plain view of a passing jury. (App. 14a). When Defendant Schechtman threatened the Plaintiff with Iowa Rule 80, sanctions, for reporting Schechtman's illegal ex parte rulings by Petition (App. 45a & 47a), the plaintiff was denied due process of law. The Fifth Amendment to the Constitution of the United States states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Plaintiff lost the protection of the law guaranteed by the Constitution of the United States and thus was deprived most of his life, liberty, and property. Section 1 of the XIV Amendment to the Constitution of the United States states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

To establish a RICO case against the four Defendants mentioned, one must prove that an "enterprise" that has some ascertainable structure distinct from that inherent in a pattern of racketeering. Obtaining proof that an enterprise existed was made difficult when U.S. District Court granted all four defendants immediate Protective Orders so they could escape answering any questions, making any admissions, and producing any documents that would prove their family or enterprise existed. It was common knowledge that Iowa Supreme Court Justice David Harris had been a thirty-five year personal friend of Defendant Harold Spencer so it was no wonder that the Justice appeared in court as a willing witness for Harold Spencer to help him win a $60,000.00 judgment at 10% interest against the Plaintiff, a man whose social security is only $199.05 per month. Harold Spencer's attorney, Defendant Scott Hillstrom often bragged about being a close family relative of Justice Harris. Defendant Hillstrom has helped Defendant Harold Spencer sue many other individuals with favorable outcomes such as Dale Spencer, Terry Spencer, Katheryn Spencer, his neighbors, and machine manufacturers. (App. 21a & 22a).

The interstate transportation of illegal drugs is a building block for a RICO case. Page (App. 48a) of the Appendix shows a letter from Defendant Hillstrom listing a "Rehab One" address, an address which he has openly refused to explain. Please note that a copy of this letter was sent to Rosemary VanSchooten, daughter of Harold Spencer. The Rehab is in Bloomington, Minnesota, next to the drug capital of the middle west, Minneapolis, MN. Defendants Hillstrom and Spencer had selected Defendant First American State Bank as a Trustee. The Trustee

worked with a lawyer called David Ophien who constantly used illegal drugs to the extent that his mind was ruined and he later died. Attorney Ophien was the number two man in the huge Kersten law firm appointed by Defendant Hillstrom and Defendant Harold Spencer to serve as Trustee. The Protective Orders shielded Defendant Hillstrom from answering any questions along these lines.

There is evidence that Defendant Hillstrom may have been transporting drugs into or from Canada with a man called Bob Erickson of Sioux Narrows, Ontario, Canada. My wife has had a homestead in that area of Canada for 25 years and we personally knew this Erickson who owned and operated a large seaplane for the purpose of transporting drugs from Hibbing, Minnesota, a small town just North of Bloomington, Minnesota. Later, Mr. Erickson was murdered. Again, the Protective Orders granted by U.S. District Court prevented any answers to questions along the lines of transporting drugs into or out of Canada.

There is further evidence that an enterprise exists among these defendants through the relationship of Defendant Hillstrom and Defendant Harold Spencer's daughter, Rosemary. Although they are each married to someone else, they continued to be together very visibly in the courtroom. Scott Hillstrom has referred to the farm home of Defendant Harold Spencer as the "Motel down there in Scranton, Iowa" where he and Rosemary stay when Defendant Harold Spencer is on his trips abroad or to South America.

To summarize, the protective orders granted by the U.S. District Court made it impossible to prove that a family or enterprise existed separate and apart from their racketeering activities. What one can see is an ongoing group of four people or more living and working together when they should not, becoming dependent on illegal drugs, using their racketeering activities across State line and telephone wire and across State lines and the U.S. border into and from Canada. The family ties of Defendants Hillstrom and Spencer, with powerful Iowa Supreme Court Justice David Harris, are everywhere, aside and apart from their racketeering activities.

Defendant Judge Ronald Schechtman was ruled by District Court to be immune in this case because the State of Iowa claimed that a judge can violate a U.S. citizen's Constitutional Rights and do it corruptly or maliciously, *Pierson v. Ray*, 386 U.S. 547, 553-555 (1967). I believe this to be false, otherwise the U.S. Constitution is not worth the paper upon which it is written. If a judge wants to rule maliciously and corruptly over an issue pertaining to the administration of a Trust, that can be understood to fall under *Pierson v. Ray* (App. 14a), but when these malicious and corrupt rulings take precedent over the Constitution of the United States, that is unacceptable and must be heard. When Defendant Judge Schechtman violated my free speech and due process, he was not ruling on the administration of a Trust, he was violating my basic civil rights and he must be held accountable.

Two defendants in this RICO case absolutely refused to accept the responsibility of making a timely response, even when served repeatedly. Thus they should be held for default in accordance with the law. (App. 49a).

> Failure to plead or defend justifies a default entry. *Bolduc v. Bailey,* 586 F. Supp. 896 (D. Colo., 194); *CFTC v. American Commodity Group Co.,* 753 F.2d 862 (1984)

> Evidentiary hearing is not required in default judgment context where amount claimed is liquidated or capable of mathematical determination. *James v. Frame,* 6 F.3d 307 (5th Cir. 1993)

Without any doubt Defendants Hillstrom and First American State Bank should be held for Default in this case. They were served properly along with the other two Defendants and were the only two who did not respond. Defendants Hillstrom and First American were served a second time and still they failed to respond until long after the judicial time limits had expired. By their actions, Defendants Hillstrom and First American expressed arrogance beyond imagination. Federal Rule of Civil Procedure 55(b) definitely holds these Defendants for Default of over $700,000 each which is legally three times the actual damages sought.

> Default judgment would be granted against employer in action by chairman and fiduciary of multi employer benefit plan given employer's failure to answer or otherwise respond to amended complaint which plaintiff had been granted leave to file. *Parise v. Riccelli Hauler,* 672 F. Supp. 72 (N.D. N.Y., 1987)

District Court improperly ruled that since the case was finally dismissed almost a year later that Default was not applicable. In accordance with existing law Rule 55, Default is Default, a later ruling for dismissal is without merit. Rule 55, Default states:

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as ordered by these rules and that fact is made to appear by affidavit otherwise, the clerk shall enter the party's Default.

JUDGMENT: Judgment by Default may be entered as follows:

(1) By the Clerk: When the Plaintiff's claim against a Defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2) By the Court: In all other cases the party entitled to a judgment by default shall apply to the court, therefore; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of

> any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord as right of trial by jury to the parties when and so required by any statute of the United States.

Once a defendant fails to file a responsive answer he is in default, and entry of default may be made by either the clerk or judge. *Jackson v. Beech*, 636 F.2d 831 (D.C. Cir. 1980)

REASONS FOR GRANTING THE WRIT

The Ruling from District Court Dismissing the case for lack of claim unjustly denied the four defendants a requirement to show there is no set of facts upon which the Plaintiff could recover and in doing that they have to assume that everything in the Petition is true. It does not matter whether the court finds the Petition to be likely or even believable if it is correctly stated the court must assume it to be true and allow the case to continue, unless the Defendants can prove the Plaintiff can never recover under these facts.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and the opinion of the U.S. District Court and the U.S. Court of Appeals.

Dated March 29, 1996

Respectfully submitted,

LYLE D. SPENCER, pro se

Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1006

Lyle D. Spencer, Appellant, v. Harold Lee Spencer; Scott Hillstrom; First American State Bank, of Fort Dodge, Iowa; Ronald Schechtman, Appellees.	* * * * * * * * * * * *	Appeal from the United States District Court for the Northern District of Iowa. [UNPUBLISHED]

Submitted: October 19, 1995

Filed: October 23, 1995

Before FAGG, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Lyle D. Spencer appeals the district court's[1] dismissal of his complaint for failure to state a claim under 42 U.S.C. § 1983 and the Racketeer Influenced and Corrupt

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[1] The Honorable Donald E. O'Brien, United States District Judge for the Northern District of Iowa.

Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). Having carefully reviewed the record and the parties' briefs, we conclude that no error of law or fact appears and that an opinion would lack precedential value.

Accordingly, we affirm. *See* 8th Cir. R. 47B.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LYLE D. SPENCER, Plaintiff,	)	No. C93-3039
vs.	)	ORDER
HAROLD LEE SPENCER, et al., Defendants.	)	(Filed Apr. 1, 1994)

This matter comes before the court on several outstanding motions by the parties, including a motion to dismiss by defendant Harold Spencer, in which defendants First American State Bank and Scott Hillstrom joined, a motion to dismiss by defendant Judge Ronald Schechtman, a motion for default by the plaintiff, and plaintiff's objections to an order by Chief Magistrate Judge John Jarvey. The court held a hearing on these motions and, due to plaintiff's pro se status, allowed plaintiff to present testimony and exhibits in his behalf. For reasons that will be more fully explained in this order, the court declines to rule on the motion for default and the objections to the Magistrate's order because the motions to dismiss by the defendants are granted and this action is dismissed.

I. FACTS

This is an action by Lyle Spencer, pro se, under the provisions of the Racketeer Influenced and Corrupt

Organizations Act, 18 U.S.C. § 1961, et seq. (RICO) against his older brother Harold, Scott Hillstrom, his brother's attorney during the time involved, the Fort Dodge Bank serving as the Trustee for the Trust of Harold and Lyle's father, and Iowa District Court Judge Ronald Schechtman, who presided over the trial of the libel action brought by Harold against Lyle and various proceedings related to the administration of their father's Trust. Lyle Spencer further asserts a claim against Judge Schechtman under 42 U.S.C. § 1983.

The complaint arises out of events occurring after Lyle and Harold's father died in 1973. Their father set up an 800 acre farm land Trust for his 4 surviving children. The complaint alleges that defendant Harold Spencer was chosen executor and Trustee, but because of his waste and mismanagement, he was removed from that position after a few years. The complaint alleges that Harold Spencer then took steps to limit plaintiff's access to certain lawyers in the area and also took steps to try to get everyone thrown off the land except for Harold's son. The complaint alleges that Harold hired attorney Scott Hillstrom, who supposedly implied that he was close relative to Justice David Harris. Plaintiff alleges that Harold Spencer had used David Harris as his attorney in the past before he became a judge and that Judge Harris testified in the case that Harold Spencer filed against Lyle. Plaintiff alleges that Harold's connection to Judge Harris caused Judge Schechtman to issue several ex parte rulings favorable to Harold in the state case. The complaint further alleges that Harold has influenced the actions of the First American State Bank as Trustee for the family trust to harass and intimidate the plaintiff and to

wrongfully obtain concessions from Plaintiff and to get the plaintiff's leases terminated. Plaintiff alleges that Harold convinced the Trustee in 1992 that the land should be sold.

The complaint further contends that Judge Schechtman issued ex parte rulings in favor of Harold in a case in which Harold and Lyle were parties. Plaintiff states in his complaint that he complained to Judge Schechtman about these rulings and that the Judge "threatened" him with sanctions for frivolous litigation under Rule 80 of the Iowa Rules of Civil Procedure. Plaintiff further states that he has been banned from use of the Humbolt County Law Library since the public is not permitted to use the library. He states that the only way to obtain access to the library is to get permission from the Chief Judge of the Second Judicial District which is Judge Schechtman. Plaintiff further complains that when Justice Harris testified at the trial in state court, that Judge Schechtman made a "big deal" about it in front of the jury and then "fraternized" with Judge Harris in the hallway with the jurors looking on.

The complaint goes on to allege that Harold Spencer and his attorney, Scott Hillstrom, came to plaintiff's farm and wanted plaintiff to sign a petition to remove Dale Spencer, another brother, from the family land. Plaintiff says he wouldn't sign it and then Harold and Hillstrom threatened plaintiff with the same action. Plaintiff asserts this is one of the "predicate acts" for his claim under RICO. Plaintiff states that the bank then conspired with Harold Spencer in terminating plaintiff's lease

These events apparently culminated in the libel suit by Harold against Lyle and the jury awarded Harold $60,000. See *Spencer v. Spencer*, 479 N.W.2d 293 (Iowa 1991). Plaintiff alleges in his complaint that the totality of the action described in his complaint constitutes a pattern of racketeering activity under RICO and that all of the defendants participated directly or indirectly in the conduct of the enterprise instituted by Harold Spencer.

Defendants have moved to dismiss the complaint for failure to state a claim upon which relief can be granted. In particular, defendants assert that, as a matter of law, plaintiff's RICO claims are barred by the statute of limitations and further, that plaintiff cannot make out a RICO claim based on the allegations in his complaint. In addition, Judge Schechtman moves to dismiss on the grounds of judicial immunity.

II. DISCUSSION

A defendant must surmount a major obstacle in order to persuade this court to dismiss the plaintiff's claim at so early a stage in the litigation. "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[1] *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Thus, it is only in the "unusual case" where the complaint on its

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[1] The Rule does not countenance dismissals based on a judge's disbelief of a complaint's factual allegations. *Neitzke, et al. c. Williams*, 490 U.S. 319, 327 (1989).

face reveals some insuperable bar to relief that a dismissal under Rule 12(b)(6) is warranted. *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982). The issue is not whether plaintiffs will ultimately prevail, but rather whether they are entitled to offer evidence in support of their claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *United States v. Aceto Agricultural Chemical Corp.*, 872 F.2d 1373, 1376 (8th Cir. 1989).

Defendant Harold Spencer filed the first motion to dismiss for failure to state a claim upon which relief can be granted. Defendants First American State Bank and Scott Hillstrom joined in that motion. In the motion, defendant Harold Spencer first attempts to clarify that the genesis of plaintiff's claims in the instant case can be traced back to the entry of judgment on March 8, 1990 in favor of Harold Spencer against this plaintiff Lyle Spencer. The jury found various letters written by Lyle Spencer were libelous and awarded damages in the amount of $25,000 actual damages and $35,000 punitive damages. Harold states that Lyle had refused to voluntarily pay any part of this judgment and in fact, took steps with his wife to place his property beyond the reach of that judgment. Therefore, Harold commenced actions in Humbolt County Court challenging these various transfers between Lyle and his wife as fraudulent. In February, 1992, Judge Mark Cady entered a ruling that Lyle and Katheryn Spencer had fraudulently transferred property in an attempt to defraud Harold Spencer. Various counterclaims by Katheryn and Lyle for abuse of process, malicious prosecution and intentional interference with contractual relations were dismissed. Following this order, the Humbolt County Sheriff proceeded to

sell the property subject to the execution to apply it toward the judgment. Harold (defendant here) states that the day before the sale, Lyle (plaintiff here) filed the first of three actions against Harold, which culminated in the instant case alleging RICO violations.

For their motions to dismiss, the defendants contend that plaintiff cannot make out a RICO claim as a matter of law. Defendants point out that to establish a RICO claim, plaintiff must establish: (1) the existence of an enterprise which affects interstate or foreign commerce; (2) that the defendants were employed by or associated with the enterprise; (3) that the defendants participated in the conduct of the enterprise's affairs, and (4) that the participation was through a pattern of racketeering activity. *Sedima, S.P.R.L. v. IMREX Co., Inc.*, 473 U.S. 479, 496 (1985). Even assuming plaintiffs allegations in his complaint are true, defendants state that plaintiff has failed to plead a RICO claim against them.

As to the first element, defendants assert that plaintiff must plead and ultimately prove an "enterprise" that has an independent, identifiable existence separate and distinct from the pattern of racketeering activity in which it is alleged to be engaged. *United States v. Turkette*, 452 U.S. 576, 582-83 (1981); *United States v. Bledsoe*, 674 F.2d 647, 664 (8th Cir.), *cert. denied, sub nom.* Defendants contend that plaintiff's allegations are insufficient as a matter of law to establish an "enterprise," much less one affecting interstate or foreign commerce.

Plaintiff, in response asserts that Harold Spencer and Scott Hillstrom crossed state lines and international borders to go to photograph a Canadian homestead owned

by plaintiff in an effort to show wealth that plaintiff says he doesn't have. Plaintiff also states that in June 1992, Defendant Spencer and his lawyer, Hillstrom conspired with the Trustee, defendant Bank, in a scheme to violate their father's will by selling the Trust Corpus consisting of 800 acres of farm land. Again, plaintiff says state lines were crossed and U.S. telephones used.

Finally, plaintiff states that this is all about a conspiracy to violate his rights and an obvious case of racketeering and that the abuses are so constant and horrid that he is trying to immigrate to a foreign country to escape the "legal tyranny."

In his second response to the motion to dismiss, plaintiff states that Judge Harris of the Iowa Supreme Court used his influence and prestige to help his personal friend, Harold, win a huge judgment. Plaintiff says the judgment was won over the testimony of Kenny Robbins, Harold Spencer's next door neighbor who apparently testified that defendant Harold cheated his landlady on farm shares. As for the ruling of Judge Cady, who found that plaintiff and his wife were guilty of fraud, plaintiff states that Judge Cady's opinion is a clear cut case of discrimination against women and is an obvious joinder in the conspiracy by Judge Cady and is further evidence of a RICO violation. Plaintiff further asserts that in the case in front of Judge Cady, defendant Harold Spencer and his attorney Michael Thrall falsified court documents, including a deposition of plaintiff and this is further evidence of RICO violations. Ultimately, plaintiff asserts that he can and has properly alleged facts which amount to RICO violations. The court has reviewed the complaint of the plaintiff and the additional evidence

submitted by plaintiff at the hearing on the motions and thereafter, and must agree with defendants that plaintiff had not properly pled the existence of an "enterprise" sufficient to withstand the motions to dismiss. As defendants have pointed out in their motions to dismiss, an "enterprise" must be an entity separate and apart from the pattern of racketeering activity in which it engages. *Turkette*, 452 U.S. at 583. In *Segreti v. Lome*, 747 F.Supp. 484 (N.D.Ill. 1990), the United States District Court for the Northern District of Illinois stated the following with respect to properly pleading the existence of an enterprise:

> An "enterprise is an ongoing 'structure' of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchial or consensual decision-making." *Jennings v. Emry*, 910 F.2d 1434, 1440 (7th Cir. 1990). The existence of an enterprise is established by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981). While a plaintiff need not allege in his complaint information sufficient to *prove* the existence of an enterprise, a plaintiff must *identify* the enterprise. And, such identification must necessarily include details about the structure of the enterprise. *See Jennings*, 910 F.2d at 1439-1440, 1441.

Segreti, 747 F.Supp at 486. The court in *Segreti* went on to find that the plaintiffs in that case made overly broad allegations of an enterprise merely by asserting in a conclusory fashion that the three defendants constituted an enterprise. *Id.* The court further noted that the plaintiffs

did not identify anything approaching a "continuous structured organization." *Id.* As the court in *Segreti* stated, "the identification of an enterprise by reference to the activities and conduct of defendants is not sufficient to state a claim. An enterprise must be an 'entity separate and apart from the pattern of racketeering activity in which it engages.' " *Segreti*, 747 F.Supp. at 486 (citing *Turkette*, 452 U.S. at 583). *See also, United States v. Lemm*, 680 F.2d 1193, 1198 (8th Cir. 1982); *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982).

The analysis of the "enterprise" issue is equally applicable in this case. Plaintiff has stated several activities by the named defendants which he concludes constitutes racketeering activity. Plaintiff alleges that these defendants conspired to do these things to harm him. However, plaintiff's complaint and supplemental evidence are insufficient to establish an "enterprise" for purposes of the RICO statute. Plaintiff has attempted to identify the enterprise by reference to the activities allegedly committed by the defendants. As the Eighth Circuit recently stated:

> The essential characteristics of an enterprise under RICO include: "(1) a common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that inherent in a pattern of racketeering." *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989) (citing *United States v. Kragness*, 830 F.2d 842, 855 (8th Cir. 1987). In particular, "an enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts." *United States v.*

> *Bledsoe*, 674 F.2d 647, 664 (8th Cir.) *cert. denied*, 459 U.S. 1040, 103 S.Ct. 456, 74 L.Ed.2d 608 (1982).

Stephens, Inc. v. Geldermann, Inc., 962 F.2d 808, 815 (8th Cir. 1992). The court is persuaded in this case that plaintiff's complaint fails to identify an "enterprise" that has some ascertainable structure distinct from that inherent in a pattern of racketeering. In other words, plaintiff has alleged an enterprise by referring to the undertaking of the alleged acts of racketeering and the minimal association of these defendants surrounding these alleged acts. This is insufficient to establish an enterprise under *Stephens*. For this reason, the court is persuaded that the motion to dismiss by the defendants must be granted because plaintiff has not properly pled the existence of an "enterprise" under 18 U.S.C. § 1961 et seq.

The court is also persuaded that the alleged acts relied on by plaintiff are not "racketeering activity" within the intent or scope of RICO. "Racketeering activity" is defined in 18 U.S.C. § 1961(1) as follows:

> (1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any one of the following provisions of title 18, United States Code: . . . (C) any act which is indictable under title 29, United States Code, section 186 . . . or section 501(c) . . . , (D) any offense involving fraud connected with a

> case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

Again, the court has reviewed all of the acts plaintiff alleges these defendants committed and must conclude that none fit the definition of "racketeering activity" as required by the above statute. Therefore, even if plaintiff could properly plead and prove the existence of an "enterprise" for purposes of RICO, plaintiff's allegations do not amount to "racketeering activity" under RICO and thus, the motions to dismiss must be granted on that basis as well.

Because the court has determined two separate reasons for dismissing plaintiff's complaint, the court declines to address the issue of whether the statute of limitations has run on plaintiff's RICO claims. In addition, because plaintiff's RICO claims must be dismissed with respect to all defendants, the motion for default by plaintiff and plaintiff's objections to Magistrate Judge Jarvey's order granting protective orders are moot.

The court is left, then, with the motion to dismiss plaintiff's § 1983 claim against defendant Judge Schechtman. Defendant Judge Schechtman has filed a motion to dismiss on the grounds that he is immune from suit. Specifically, he asserts that plaintiff cannot sue the judge involved in state court litigation of disputes relating to a family trust. The United States Supreme Court has long

held that judges are absolutely immune from suit when acting within the scope of their judicial duties. *See Stump v. Sparkman*, 435 U.S. 349 (1978). Defendant Schechtman points out that in the *Stump* case, the court determined that the test for determining whether something is in the scope of judicial duties is (1) whether the act is a function normally performed by a judge and (2) whether the judge was interacting with the complaining party in a judicial capacity. *Id.* at 352. Defendant points out that judges are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly. *Id.* at 356. Defendant points out that all acts alleged to have been done by Judge Schechtman concern his rulings in the state court litigation of matters relating to a family trust. Thus he is immune from suit.

In response, plaintiff asserts that Judge Schechtman has prevented plaintiff from using the law library. Plaintiff states that he is not "alleging" anything but rather has *proof* of ex parte rulings by Judge Schechtman. Plaintiff says the judge was not acting within the scope of his judicial duties and thus is subject to suit. Plaintiff says the judge was involved in a conspiracy with Defendant Harold Spencer, Scott Hillstrom, and the Sheriff of Humbolt County. Plaintiff says the judge is not immune for threatening plaintiff with Rule 80 sanctions when plaintiff complained about the ex parte rulings. These acts all are functions normally performed by a Judge and even if true, which this court need not decide, are acts that are immune from suit. The allegation that gives the court more concern is that Judge Schechtman "fraternized" with Justice Harris, a member of the Iowa Supreme Court

who was a witness for plaintiff's brother in their civil suit. Judge Schechtman supposedly carried on cordial, friendly discussions with Justice Harris in the hallway in front of the jurors just before or just after[2] the Justice testified against the plaintiff.

Defendant Judge Schechtman does not admit that he fraternized with Justice Harris, but contends that even if he did, he is immune from suit under *Stump*. Further, the defendant contends that throughout the course of a trial a judge will interact with witnesses and that while a judge's interaction with a witness may be grounds for an appeal, it does not remove the action from being a judicial function. *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972).

The court has reviewed the allegations of the plaintiff and the cases cited by the parties regarding judicial immunity. The court would note that the allegations of fraternizing with a Justice/witness in the visible presence of the jury, if true, was at best, ill advised on Judge Schechtman's part. This court consistently reminds juries that we not only have to have a fair trial, but we also must have all of the appearances of a fair trial. When a judge, in a friendly positive way, passes the time of day in the hallway with one side's witness in the presence of jurors, he undoubtedly sends the jury a message about that witness's credibility. Such an act may well deprive the other side of a fair trial. However, while this court does not necessarily agree with the result, it must grant

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[2] The record here is not clear whether it was just before or just after the Justice testified. It would seem to this court that it would make no difference, just before or just after.

defendant Judge Schechtman's motion to dismiss on grounds of judicial immunity. While this type of conduct is covered by judicial immunity, this court does not believe it always should be. This court is hard pressed to believe that a trial Judge who is out in the hall, in the presence of jurors, carrying on a friendly conversation with a witness who just has or is just about to testify and present damaging testimony, is performing a "judicial function." It is this court's opinion that such conduct is much closer to being done in the clear absence of all jurisdiction. However, the Supreme Court has held that judicial immunity applies even when the judge is accused of acting maliciously and corruptly. *See Pierson v. Ray*, 386 U.S. 547, 553-555 (1967).

The court is persuaded that it has no choice but to grant the dismissal based on judicial immunity in this case. As the Fifth Circuit noted, the system has its own built-in corrective measure for situations when judges act improperly; i.e., the improprieties of judges may be attacked and appealed from, either directly or collaterally. *McAlester v. Brown*, 469 F.2d at 1283. The correct course of action is a State Court appeal. This court is persuaded that had plaintiff appealed the judgment of the Iowa District court in the above mentioned case on the grounds of judicial misconduct or lack of a fair trial, based on the fraternization with the Justice/witness, he may well have succeeded in his appeal. However, the act appears to be covered by the doctrine of judicial immunity as it now stands and therefore, plaintiff cannot maintain an action against the Judge for those acts. Defendant Judge Schechtman's motion to dismiss must be granted.

III. CONCLUSION

The court has reviewed plaintiff's papers at great length and has considered the arguments of the parties. The court is persuaded that as a matter of law, plaintiff's allegations, even when taken as true, are insufficient to maintain a RICO claim against these defendants. The plaintiff has not properly alleged an "enterprise" for purposes of RICO and further, the acts allegedly taken by the defendants do not constitute "racketeering activity" as that term is defined in the RICO statutes. Therefore, the defendants' motions to dismiss must be granted. In addition, the court is persuaded that it has no choice but to grant the dismissal of plaintiff's § 1983 claim against defendant Judge Schechtman based on the doctrine of judicial immunity. Based on these rulings, the court is persuaded that the motions for default and objections to Magistrate Judge Jarvey's rulings by plaintiff are moot.

Upon the foregoing,

IT IS ORDERED that the motion to dismiss by defendant Harold Spencer, which was joined in by defendant First American State Bank and defendant Scott Hillstrom, is granted.

IT IS FURTHER ORDERED that the motion to dismiss by defendant Judge Schechtman is granted.

IT IS FURTHER ORDERED that plaintiff's motions for default and objections to Magistrate Judge Jarvey's order are denied as moot.

IT IS FURTHER ORDERED that this action be dismissed, with each party to bear its own costs.

Dated this 31st day of March, 1994.

/s/ Donald E. O'Brien
Donald E. O'Brien, Senior Judge
UNITED STATES DISTRICT COURT

Copies mailed on Apr 1, 1994
to counsel of record or pro se
parties as shown on the docket
sheet.

/s/ Illegible
Deputy Clerk

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF IOWA – CENTRAL DIVISION

LYLE D. SPENCER,
Plaintiff,

V. **JUDGMENT IN A CIVIL CASE**

HAROLD LEE SPENCER ET. AL,

Defendants.

CASE NUMBER: C93 - 3039

(Filed Apr. 1, 1994)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to ~~trial or~~ hearing before the Court. The issues have been ~~tried or~~ heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT the plaintiff, Lyle D. Spencer, take nothing and this action be dismissed, with each party to bear its own costs.

April 1, 1994
Date

WILLIAM J. KANAK
Clerk

/s/ Gary L. Zoblke
(By) Deputy Clerk

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LYLE D. SPENCER, Plaintiff, vs. HAROLD LEE SPENCER, ET AL, Defendants.	)	C93-3039 PARTIAL TRANSCRIPT OF HEARING

The Hearing held before the Honorable Donald E. O'Brien, Judge of the United States District Court, Northern District of Iowa, Central Division, on February 3, 1994, commencing at 1:30 p.m. in the Federal Building at Fort Dodge, Iowa.

Reported by Dianne Schuetts, CSR, RPR, CM, NP

[p. 2] APPEARANCES

LYLE D. SPENCER, 1925 Utah Avenue, Goldfield, Iowa, appearing pro se.

MICHAEL W. THRALL, Attorney at Law, 699 Walnut Street, Suite 1900, Des Moines, Iowa, appearing on behalf of the Defendant Harold Lee Spencer.

JAMES L. KRAMER, Attorney at Law, 600 Boston Centre, Fort Dodge, Iowa, appearing on behalf of the Defendant First American State Bank.

ROBERT B. HANSON, Attorney at Law, 1300 Des Moines Building, Des Moines, Iowa, appearing on behalf of the Defendant Scott Hillstrom.

MAUREEN McGUIRE, Assistant Attorney General, 2nd Floor, Hoover State Office Building, Des Moines, Iowa, appearing on behalf of the Defendant Ronald H. Schechtman.

[p. 3] (The following record was made at the end of the hearing on February 3, 1994.)

THE COURT: Mr. Thrall, you might consider the possibility of spending a little money and getting a transcript of what I am about to say. Exhibit C-1 is a letter from Hillstrom and Bale, Ltd. of Minneapolis to the Greene County Court, Clerk of the Court, Re: Harold Lee Spencer. And it has to do with – he asks that this be included in the L. J. Spencer trust file number 8046. Then he goes on and talks about Harold Spencer, and it's very laudatory, and he says I am writing for the benefit of friends, neighbors and future generations who may one day read these words. And he goes on to say that Harold has always conducted himself in a very highest [sic] level of integrity, honesty and good will. He has expended not only his energy but even large amounts of private funds to live up to the promise he made to his father, L. J. Spencer, who I believe is rolling around in his grave today to protect the farm. Harold has always acted [sic] genuine deeply felt conviction [sic] but he was carrying out a promise [p. 4] and has never acted with any other motivation. There is no man that I have ever known that I would trust more or hold in higher honor than Harold Spencer. He has lived his life with pride, honor and

integrity and should always be held in the very highest esteem not only by those who knew him but by those who did not have the good fortune of knowing him. Future generations should hold their head high and be very proud to carry his good name.

Now, we would all hope we could get a letter like that sometime some place set out on the records at the courthouse or any place else. So that is very commendable.

Now I would like to call your attention to the Exhibit O which is In The District Court In and For The State of Iowa In and For Greene County, In the Matter of the Trust Under the Will of L. J. Spencer, Deceased, Harold Lee Spencer, Co-trustee. He files a petition, and he says in there that Dale Eldon Spencer is doing all kinds of bad things, wrongfully converting trust funds, converting trust funds to his own personal [p. 5] use, committing waste. It goes on for pages and pages, goes through paragraph Z, has to start over with AA and BB, and in each of those paragraphs he is saying very tough things about his brother Dale. It is on a report to the Court. Then on page 7 he starts saying tough things about Lyle Spencer. And he talks about Lyle Spencer depriving the trust of income, Lyle Spencer causing the trust loss of income. Paragraph F he gets even a little tougher and he says that Lyle Spencer is guilty of fraud. He goes on and on. And he gets through only to J with Lyle. Then he teams them up and he says on page 9, paragraph 6, that both Dale and Lyle have, and then he starts talking about both of them, and they have made unauthorized disbursements of funds, they have exposed the trust to liability, they have done bad things for personal gain.

And he goes on then to say that they ought to be thrown out.

Now, as I understand it, and correct me if I am wrong, Lyle Spencer, the plaintiff here, decided to answer and respond to those things, and he made one mistake, and that is [p. 6] he didn't file it with the clerk of the court, and he did send a couple of copies to other people who weren't involved. And I guess he could have said the same thing and he couldn't have said anything tougher than fraud, but he made the mistake of putting them in the public. At least the supreme court decided that he did.

Now, let's go back to this laudatory letter that talks about what a great person Harold Spencer is. Harold Spencer decided that my brother said some mean things about me and I am going to sue him and I am going to sue him for a million dollars. He got $60,000. He is now trying to collect that money and he is surprised that Lyle Spencer doesn't like it and is trying to hide the fact that he has some assets, if he does. And I have read the pleadings where the court found that Lyle Spencer had hid some assets. I am not sure how much of the $60,000 has been paid plus interest, but I read and note one thing where Lyle Spencer said that they took some of his money and put it on the interest and nothing yet on the principal. I don't know [p. 7] how true or accurate that is. But let's go back to this laudatory letter. He is of the very highest level of integrity, honesty and good will, and he is an outstanding person and future generations should hold their heads high. I wonder how old grandpa is rolling around in his coffin because Harold is trying to get the last buck out of Lyle and Harold is upset because

Lyle is suing him. I don't think any of them are without some fault, but it taints the great letter, the laudatory letter, in my opinion. It taints it quite a bit to say I am going to keep trying to collect that dough from my brother even if I have to sell his wife's cabin in Canada.

I think this case ought to be settled and I think the whole thing ought to be settled, and about the only way it is going to be settled maybe is by death. I am glad that when I go up there to talk to St. Peter to try to get in that I don't have this crap on my record.

Anybody else got anything they want to say?

[p. 8] MR. THRALL: Your Honor, I guess I don't know that I can let your comments go by without saying something on behalf of my client.

THE COURT: Go ahead.

MR. THRALL: Harold Spencer is going to go to St. Peter with his conscience clean, and he doesn't have any – I guess I am not sure what the court meant to imply by reading certain things Lyle Spencer has filed and filed at great length, selectively what he has chosen to present to the court at this particular time.

THE COURT: Just a minute. I am going to give you a chance to talk. If I didn't make myself clear I want to make myself clear. I am not saying Lyle is a saint. I am not saying Lyle hasn't said tough things about his brother. He didn't say anything tougher than fraud though, and all I'm saying is that they are both out of line and I wouldn't want to be there when they cash in. Go ahead.

MR. THRALL: Well –

THE COURT: Do you have any brothers, Mr. Thrall?

[p. 9] MR. THRALL: I do not, your Honor. I have a couple sisters.

THE COURT: I had five, and God bless me if I ever treated any of them like that. Go ahead.

MR. THRALL: No, I have nothing further, your Honor.

THE COURT: I don't want to stop you.

MR. THRALL: No, no.

THE COURT: I want to tell you why I said what I said.

MR. THRALL: I have nothing further.

MR. SPENCER: I think maybe, your Honor, I can shed some light on why that letter was written, such a laudable letter for Harold Spencer.

THE COURT: I know it was by his lawyer and it has nothing to do with how I am going to rule.

MR. SPENCER: Oh, well –

THE COURT: I'm only saying to you it is a nice letter and I think we would all like to have one like that if it were written [p. 10] by somebody. And I am only saying that I am not sure.

MR. SPENCER: Yes.

THE COURT: By your deeds you shall know them. You ought to sit down, and whatever church you

go to, and try to figure out if you can't work out something with your brother, and your brother ought to do the same thing, and you ought to work it out.

MR. SPENCER: Your Honor, I just want to say why the letter was written.

THE COURT: Well, the letter was written because, I know what you are going to say, his lawyer wanted him to look good.

MR. SPENCER: Well, your Honor, I think Harold owed his lawyer perhaps $200,000. And I think that was one of Mr. Hillstrom's ways to get him to pay. Because I think if you look at the date on that letter and the date when the trial closed and Harold was supposed to pay Mr. Hillstrom, you'll find the letter and the costs of that lawsuit were right together. So that is what it looked like to me.

THE COURT: All right, but now you [p. 11] come in here today and you have said a lot of nasty things about your brother and you do that because he said nasty things about you and he is trying to hustle the sheriff to get your last buck, right?

MR. SPENCER: Your Honor, the sheriff up there to get my last buck has falsified court records.

THE COURT: Well, we are not getting into that today. You haven't sued him. But the point is they are after you, right? How much do you still owe him?

MR. SPENCER: Well, as far as I know I still owe him the $60,000 and it is climbing at 10 percent.

THE COURT: Okay. Nothing that I said is going to influence how I rule. I have got to rule on the code sections and on the statute of limitations, and if I don't do it that way the Eighth Circuit will straighten me out in a hurry, and I am aware of that. I, however, don't think that I have to conduct court, spend a half a day on it without having an opportunity to tell what it looks like. Now, one of the reasons we have had all this [p. 12] is because there has been a statement about ex parte rulings. And whatever you get from us is not going to be ex parte, is it?

MR. SPENCER: I hope not, your Honor.

THE COURT: Ex parte means you didn't have a chance.

MR. SPENCER: That is correct.

THE COURT: And you have had a chance today.

MR. SPENCER: I appreciate that very much, your Honor.

THE COURT: I am not asking for pats on the back. I am saying that is why we had this. The lawyers are shaking their heads and wondering about all this. The reason we had this is so we don't have any ex parte rulings. Okay?

MR. SPENCER: Okay.

THE COURT: Thank you. We'll be in recess.

* * *

(Whereupon, the foregoing hearing was concluded at 4:30 p.m.)

* * *

[p. 13] CERTIFICATE

I, Dianne Schuetts, appointed the official shorthand reporter for this hearing, hereby certify:

That I acted as such reporter on the hearing commencing on February 3, 1994, and took down in shorthand the testimony offered and proceedings had on said hearing.

That the foregoing pages are a true and correct partial transcript of said shorthand notes so taken by me in said hearing at the times therein shown.

Dated at Sioux City, Iowa this 29th day of April, 1994.

/s/ Dianne Schuetts
Certified Shorthand Reporter

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ROBERT A. HILLSTROM
Senior Legal Assistant
RUSSELL C. McCANDLESS

March 14, 1990

Greene County Clerk of Court
Greene County Court House
Jefferson, Iowa 50129

Re: Harold Lee Spencer

Dear Madam Clerk:

I request that you include this letter in the L.J. Spencer Trust File, Number 8046.

I have represented Harold Spencer as legal counsel since 1984. Over these years, I have worked very intimately with him and his family in disputes involving the L.J. Spencer Trust and the libel inflicted against him by his brother, Lyle Spencer. I am writing for the benefit of friends, neighbors, and future generations who may one day read these words.

Harold has endured intensive litigation and paid a very high price to clear his name. A jury of eight has heard the evidence for fully one week and has ruled that certain

accusations made against Harold were false and unjustified. In the trial, Justice Harris of the Supreme Court testified not only that Harold is an honorable and trustworthy man, but that he trusted Harold so much that he would even be willing to make him his own conservator. Other people from the community also came forward to testify to Harold's extremely high integrity and honesty. I now wish to add my remarks to theirs.

In the six years that I have worked with Harold, he has always conducted himself with the very highest level of integrity, honesty, and good will. He has expended not only his energy, but even large amounts *of his private funds to live up to the promise that he made to his father, L.J. Spencer, to protect the farm.* While others may have differed from time to time in their opinion, Harold has always acted in the genuine, deeply felt conviction that he was carrying out a promise, and he has never acted with any other motivation. Over this time, I have come to know Harold also on a personal level and can say that there is no man I have ever known that I trust more or hold in higher honor than Harold Spencer. He has lived his life with pride, honor, and integrity, and should always be held in the very highest esteem not only by those who knew him, but by those who did not have the good fortune of knowing him personally as I have. Future

generations should hold their head high and be very proud to carry his good name.

Very truly yours,

HILLSTROM & BALE, LTD.

/s/ Scott D. Hillstrom
Scott D. Hillstrom
SDH/dak

cc: Harold Spencer
Paul Spencer
Rosemary VanSchooten

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CENTRAL DIV.

LYLE D. SPENCER,
Plaintiff,

v.

HAROLD LEE SPENCER,
SCOTT HILLSTROM,
FIRST AMERICAN STATE BANK,
RONALD SCHECHTMAN,

Defendants.

Case No. 93-3039

COMPLAINT

(Filed 6/4/93)

COMES NOW the Plaintiff, Lyle D. Spencer, pro se and states the following:

1. The complaint is brought pursuant to Title 18 USC §196 and Title 42 USC §1983. Jurisdiction is proper under Title 28 USC §1331.

2. The Defendants in this case are Harold Lee Spencer, R.F.D. Scranton, Iowa, Scott Hillstrom, Esq. Rehab One, Inc. 1550 East 79th Street, Bloomington, MN, First American State Bank, Fort Dodge, Iowa, and Honorable Judge Schechtman, Carroll County Courthouse Carroll, Iowa.

The Plaintiff in this Case is Lyle D. Spencer, R.F.D. Goldfield, Iowa.

3. In 1973, upon the death of L.J. Spencer, a resident of Churdan, Iowa, a 800 acre farm land Trust was established for his four surviving children and was to run for 121 years.

4. The oldest son, Harold Lee Spencer, was chosen to be the executor and Trustee.

5. Because of Harold Spencer's waste and mismanagement, he was removed as Trustee after only a few short years. The Petition for his removal is attached as Exhibit A.

6. Harold Spencer's removal set the stage for his future behavior which led him to attempt to get even with his relatives for his removal, and led to the actions which are the cause of this present lawsuit in the Federal Courts.

7. In 1975. Harold Spencer filed a petition attempting to limit the lawyers available to his brothers, Lyle and Dale Spencer, whereby, they would not be allowed to defend themselves but with only certain lawyers. Lawyers, such as William D. Kurth of Carroll, Iowa, and Mel Seiser of Ames, Iowa, a man later to become a District Court Judge, would not be allowed to represent them. His Petition for this restriction against his family is Exhibit B and dated Nov. 29, 1975.

8. In October of 1976, Harold Spencer filed another Petition, with the help of his attorney, Mr. Francis Cudahy, Jefferson, Iowa, to oust all family members and all future family generations for the following 100 plus years from ever farming any of the Trust land, Exhibit C. Family members were prevented from possessing or leasing the farm land for three years, until Harold Spencer wanted his own son to start farming.

9. Although family members did start farming the land very successfully in 1979, Harold Spencer almost immediately hired the services of attorney Scott Hillstrom to have them removed. Harold Spencer moved to have all

family members removed except for his own son, Paul Spencer.

10. On October 27, 1984, Harold Spencer came to the Plaintiff's farm near Goldfield, Iowa and introduced Scott Hillstrom to the Plaintiff as a close relative of Justice David Harris of Jefferson, Iowa. (Hillstrom has subsequently denied both this statement and the relationship to Justice Harris.) Later, Scott Hillstrom would have Justice Harris take the witness stand in a lawsuit by Harold Spencer against Lyle Spencer, the Plaintiff. This is attached as Exhibit D.

11. Harold Spencer had in the past used the services of Justice David Harris as his private attorney, before Justice Harris went on the bench. Also, several Judges, namely Judges Carl Baker, of Marshalltown, Iowa, and Ronald Schechtman of Carroll, Iowa (a Defendant) have been sufficiently impressed or intimidated by Harold Spencer's attachment to an Iowa Supreme Court Justice to issue several (5) ex parte rulings that were very favorable to Harold Spencer, without the presence of the Plaintiff, a party in interest. Exhibit E shows three of these rulings. As shall be seen below, Judge Schechtman has also attempted to silence the Plaintiff and prevent his access to the Courts of the State of Iowa.

12. Defendant Harold Lee Spencer has for a number of years influenced the Trustee First American State Bank, managed first by James O'Dwyer, and then by Merrill Peters, to harass and intimidate the Plaintiff, Lyle D. Spencer, to wrongfully obtain concessions from the Plaintiff, Lyle Spencer, in order to ruin the Plaintiff and force him from the land. In 1985 the Iowa District Court for

Greene County accepted a stipulation prepared by Scott Hillstom, stating that Harold Spencer would take no action directly or indirectly to cause the removal on any tenant then on the land. This order included the Plaintiff Lyle Spencer. (A copy of the Order is attached as Exhibit F)

13. Despite the agreement to leave the Plaintiff in peace, the lease of Lyle Spencer was terminated by the Trustee in 1988 because of the complaints of Harold Spencer in his June 3, 1988, Complaint to the Court, a copy of which is attached as Exhibit G.

14. After five or six months of uncertainty, the Plaintiff was allowed to stay on the land, and new leases were issued by the Trustee in December of 1988, after the withdrawal of Harold Spencer's objections on November 29, 1988.

15. In October of 1990 Harold informed the Trustee that the buildings, trees, and shrubs on the family farms should be torn out, burned, and buried, so the family would have no place to live. Harold Spencer wanted the land blackened. His letter to the Trustee is Exhibit H.

16. In 1992, Harold Spencer found the Plaintiff, Lyle Spencer, and the other members of the Spencer family still on the land and so hired attorney Scott Hillstrom to convince the Trustee's law Firm Kersten and Carlson that the land should be sold. The letter that Mr. Hillstrom wrote is attached as Exhibit I. It should be noted that the land Harold Lee Spencer is trying to sell is a Century Farm recently awarded as such by Iowa Secretary of Agriculture, Mr. Dale M. Cochran. This land also is the site of a family grave yard.

16½. Venue is proper as the injuries complained of occurred to property located in the Northern District, and the cause of action arose in the Northern District for that reason.

This concludes the procedural background, offered to the Court for its information. These items will be incorporated by reference in the complaints below.

Complaint pursuant to Title 42 USC §1983

17. Paragraphs 1 through 16 are incorporated by reference.

18. As has been mentioned previously, Judge Ronald Schechtman awarded two ex parte rulings in favor of Harold Spencer in litigation to which both Harold Spencer and Lyle Spencer were parties. One of these are attached as a part of Exhibit E.

19. In October of 1991, Michael Thrall, then attorney for Harold Spencer found it expedient to use an ex parte ruling previously obtained for Harold Spencer against Lyle Spencer. This left the Plaintiff concerned that if Michael Thrall were allowed to appear on behalf of Harold Spencer in trust proceedings, more ex parte rulings would be used against the Plaintiff unfairly. As a result the Plaintiff filed an objection to the appearance of Michael Thrall. A copy of this is attached as Exhibit J.

20. As a result of this motion, Judge Schechtman ruled that the Plaintiff 'alluded' to ex parte decisions (which Schechtman had written himself) and the fear that more ex parte rulings would follow, and considered that the matter was not well grounded in fact or law at that

time. A copy of this ruling dated February 17, 1992, is attached as Exhibit K.

21. As a result of the Judge's ruling, the Plaintiff filed a motion to reconsider on February 19, 1992. This is attached as Exhibit L.

22. As a result of the Plaintiff's motion to reconsider Judge Schechtman overruled the motion to reconsider and threatened the Plaintiff with sanctions for frivolous litigation under Rule 80 of the Iowa Rules of Civil Procedure. This is attached as Exhibit M. The practical result of this is that Judge Schechtman was threatening the Plaintiff for daring to complain about the perceived illegality of Judge Schechtman's own ex parte rulings.

23. The Plaintiff complained about this behavior to the Iowa Supreme Court, and was told by the Deputy Clerk that he apparently acted properly to complain about the behavior of judges issuing ex parte rulings. A copy of this ruling is attached as Exhibit N.

24. Judge Schechtman, in making his rulings acted under color of law pursuant to his appointment as Judge of the Iowa District Court.

25. In both making his ex parte rulings, and in threatening the Plaintiff with sanctions for complaining of the ex parte rulings, Judge Schechtman subjected the Plaintiff to the deprivation of a right, privilege or immunity secured by the Constitution and laws of the United States and the State of Iowa, namely, access to the courts of the State, and of due process and equal protection of the law guaranteed by the Fifth and Fourteenth Amendments to the Untied [sic] States Constitution.

26. In addition to the matter stated above, the Plaintiff states that he is frequently unable to afford an attorney, and has been banned from the use of the Humboldt County Law Library, by the Humboldt County Clerk of Court, since the public is not permitted to use the library bought and paid for in part and housed with taxpayer funds. The only way to obtain access to the library, according to Iowa Code section 321.382(7) is through the judges of the Iowa District Court. As a practical matter, thus is handled in the Second Judicial District by the Chief Judge. The Chief Judge of the Second Judicial District is none other than Judge Schechtman. While private citizens are occasionally permitted by the chief judge to use the library, it would be futile to request permission of the Chief Judge.

27. In addition, Defendant Ronald Schechtman has been reported to the Iowa Supreme Court, for abuse of power, for bragging on Justice David Harris as being a very important person as Justice Harris approached the witness stand in front of the Justice's hometown Jury, and for fraternizing in the hallways just outside the courtroom as the Jury passed for their breaks. The testimony of Justice Harris, including Judge Schechtman's introduction, is attached as Exhibit D. The actions of Defendant Judge Schechtman prevented the Plaintiff from receiving a fair Trial and thus denied the Plaintiff his constitutional rights, and constituted a separate violation of the United States Code.

Complaint under Title 18 USC §1964

28. Paragraphs 1 through 16 are incorporated by reference.

29. In late October, 1984, Defendants Harold Spencer and Scott Hillstrom approached the Plaintiff, Lyle Spencer and his wife, Kathy, at their farm home near Goldfield, leased from the Trustee.

30. In order to arrive at the farm home the Defendant Hillstrom had to move in interstate commerce to come from Minnesota.

31. The Defendants, Harold Spencer and Scott Hillstrom, were armed with a series of ex parte rulings from Judge Carl Baker, (Exhibit E), Which they had secretly prepared to remove another brother, Dale Spencer and his son, Terry, from a family trust farm.

32. The Defendants demanded that the Plaintiff sign a motion to help them remove Dale and Terry Spencer from their farmland, leased from the Trust. When the Defendants approached the Plaintiff, their actions were very pleasant. This changed in only minutes when the Plaintiff asked for 24 hours to study the Petition. The Plaintiff was immediately threatened by the Defendants, with the following statement from Scott Hillstrom, "either join us in removing Dale and Terry Spencer from the land or we will remove you." Soon an amended Petition to immediately cancel the farm lease of the Plaintiff was served. The Petition and Amended Petition are offered as Exhibits O and P. Plaintiff states that this effort was a violation of the Iowa Code Section 711.4(4) or (5) or (7) prohibiting extortion, as the Defendants attempted by improper threat to obtain a thing of intangible value, namely, the Plaintiff's assistance in suing his brother and nephew.

33. During the conversation, Defendant Harold Spencer stated that the Defendant Scott Hillstrom was close relative of Iowa Supreme Court Justice Harris, in an attempt to intimidate the Plaintiff into signing the Petition.

34. In spite of yells and screams from Defendant Scott Hillstrom in the private home of Plaintiff Lyle Spencer and his wife, Kathy, (causing Kathy to cry), Plaintiff refused to sign the Petition. The Defendants Harold Spencer and Scott Hillstrom continued to threaten the Plaintiff and his wife with expulsion from the land unless he joined in their Petition to remove Dale and Terry Spencer from the home farm of their parents and grandparents. The Plaintiff alleges that this threat was a violation of Iowa Code section 711.4(4) or 711.4(5) or 711.4(7), and as such may serve as one of the predicate acts of a claim pursuant to 18 U.S.C 1964, as may the threat described in Paragraph 32 above.

35. After failing to procure the Plaintiff's signature, the Defendants Harold Spencer and Scott Hillstrom proceeded to execute their threat of Suit against the Plaintiff, thus forcing him to expend vast sums of money in his and his families defense, to his injury and their injury.

36. Defendant First American State Bank, Trust Officer James O'Dwyer, at the behest of Defendants Spencer and Hillstrom demanded that the Plaintiff either pay rent on farm improvements the Plaintiff built out of his own savings and those of his wife or that his farm lease would be terminated of which it was so indeed terminated, Exhibit Q. Termination of this lease on September 1, 1988, was in direct violation of a Court Order signed by Judge

Carl Baker. (Exhibit F). The cancellation of this lease was prompted by untrue statements about the Plaintiff's farming in a June 3, 1988 Petition filed by Harold Spencer. (Exhibit G). This was an act of extortion of property pursuant to Iowa Code Section 711.4. Also this was sent through the United State [sic] mail in furtherance of a fraudulent scheme in contravention of 18 USC 1341.

37. Defendant First American State Bank attempted to obtain money under false pretenses for charging nearly $4000 to the family Trust for a service they claimed in fact performed when actually they had done nothing. (Exhibit R) This is still another act of extortion in violation of Iowa Code Section 711.4

38. Defendant First American State Bank, under the direction of Trust Officer James O'Dwyer, ordered their selected law firm of Kersten & Carlson, to inform Plaintiff, Lyle Spencer, that cash rent could be waived if the farm manager could be employed. At a pre Trial Hearing in the Greene County Courthouse in Jefferson, Iowa, the Plaintiff was informed by this law Firm that the farm manager to be, Mr. Stanek, was a good friend and large stockholder of Defendant First American State Bank and would cost the family $13,500 a year. This was yet another effort to obtain something of tangible or intangible value through a threat to cause some public official (a judge) to take or withhold action in violation of Iowa Code section 711.4(5).

38. First American State Bank conspired with Defendant Harold Spencer in terminating the lease of Plaintiff Lyle Spencer. Under oath in the witness stand, Defendant Harold Lee Spencer admitted to filing the June

3, 1988, objections to the Trustee to gain leverage and a pry over the Trustee and to shake things up. As previously stated, the Defendant Harold Spencer went ahead and ignored the Court Order signed by Judge Carl Baker and demanded that the lease of Plaintiff Lyle Spencer be terminated, and, because of the objections of Harold Spencer, it was terminated by the Trustee. Minutes of the Court Transcript in which Harold admits to wanting to shake things up are Exhibit S.

39. In an attempt to defend himself as pro se to protect his farm lease on 160 acres, the only way he had to make a living, Plaintiff Lyle Spencer wrote two letters to the Trustee, Defendant First American State Bank, to explain the behavior of Harold Spencer. By this time Defendant's Harold Spencer and Scott Hillstrom had already forced Dale and Terry Spencer from the land. Defendant Harold Spencer and Defendant Scott Hillstrom sued the Plaintiff for $1,000,000 for emotional distress. With a parade of bankers, lawyers, a Supreme Court Justice, and professional businessmen, standing before a hometown Greene County Jury of the Defendant Harold Spencer, an award of $60,000 at 10 percent interest was granted and affirmed by Judge Ronald Schechtman of Carroll, Iowa.

39½. U.S. Senator Charles Grassley gave Plaintiff Lyle Spencer the name of Mr. Carl Nielsen of the Iowa Bar to report abuses of lawyers and Judges. Mr. Nielsen turned the complaint of Plaintiff Lyle Spencer over to Mr. William O'Brien of the Judicial Qualification Commission. Mr. O'Brien refused to enforce laws so plainly written in the Code on ex partes and threats in Exhibit T.

40. That the totality of action described in the foregoing paragraphs constitute a pattern of racketeering activity made illegal by provision of 18 USC 1962.

41. That all of the Defendants participated directly or indirectly in the conduct of an enterprise instituted by Defendant Harold Spencer.

42. That the activities of the enterprise were conducted in part through the movement of one of the conspirators, Defendant Scott Hillstrom in interstate commerce

43. That the Plaintiff was injured by the conduct of the enterprise in his business and property to the extent at least in $68,000 expenses in legal fees, a vast loss of time, as well as a judgment wrongfully obtained for $60,000 which has now grown to nearly $100,000 with interest. The Defendants have also caused the Trust an indiscriminate amount of loss in value through turmoil and strife together with an uncertain amount for emotional distress and general damages.

Wherefore the Plaintiff prays for judgment in such amount as the Court may deem just for actual and punitive damages or triple actual damages as well as an award of attorney fees for the bringing of this action pursuant to 18 USC 1964.

IN THE DISTRICT COURT OF IOWA
IN AND FOR GREENE COUNTY

HAROLD L. SPENCER, Plaintiff,	:	CASE NO. 17141-1288 ORDER
vs.	:	
LYLE D. SPENCER, Defendant.	:	

AND NOW TO-WIT, this 1st day of October, 1990 this matter having been presented to the Court upon the Plaintiff's Application for Additional Time and for Temporary Stay, the Court having examined the record and being advised in the premises finds that certain matters ought to be stayed pending a determination of issues raised.

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that any further proceedings by the Sheriff of Humboldt County on the General Execution issued herein and the levy thereunder are hereby stayed.

IT IS FURTHER ORDERED that any action required of Plaintiff is hereby stayed pending a determination at hearing of the matters presented in Plaintiff's Application.

IT IS FURTHER ORDERED that hearing on this matter be and the same as hereby set for the 22nd day of

October, 1990 at 9:30 o'clock a.m. before this Court in the Greene County Courthouse in Jefferson, Iowa.

BY THE COURT:

/s/ Ronald H. Schechtman
Judge of the Second
Judicial District

Copies to:

Gerald W. Magee

James Cossit

Humboldt County Sheriff
Humboldt County Attorney

IN THE IOWA DISTRICT COURT FOR
GREENE COUNTY

IN THE MATTER OF THE TRUST UNDER THE WILL OF L.J. SPENCER, Deceased.	Probate No. 8588 Motion to Reconsider

****

COMES NOW the undersigned, Lyle D. Spencer, primary beneficiary of this family Trust, again objecting to the appearance of Michael W. Thrall. I humbly ask the Court to consider the following additional information and the attached documents for proof.

1) Harold Spencer has been granted many, many favorable ex parte hearings and RULINGS from the Courts. The last one granted was on October 1, 1990. It is attached and the identical time-date stamps prove this fact. The ex parte was granted by Judge Ronald Schechtman of Carrol, Iowa, and the Petition is by Harold Spencer's attorney, Mr. Gerald Magee of Jefferson, Iowa. Judge Schechtman has just overruled my original Petition stating the he was unaware of any grounds for a motion of this type at this time. His ruling is also attached.

2) Attached also are two more ex parte RULINGS favoring Harold Lee Spencer of Scranton, Iowa, by Judge Carl Baker of Marshalltown, Iowa. These documents are products of Mr. Scott Hillstrom, another partner of Mr. Gerald Magee. There are other ex parte hearings favoring Harold Lee Spencer, but these, copies of, are all that I have on hand.

TO CONCLUDE, I fear that the ex parte hearings and rulings will continue if the appearance of Michael Thrall is approved. Attached is my original objection explaining, item 2).

Lastly, I am gravely concerned that the 2nd Iowa State Judiciary may not be capable of cleansing itself. The corruption listed above in the ex partes has cost my wife and me our life savings of over $50,000 and all but forced us from our rented 160 acre farm. Consequently, I am forwarding copies of this "Motion to Reconsider" to the Des Moines Register and the Fort Dodge Messenger so the public may have the opportunity to come forth with help. The last document attached is an opinion of Justice Rosemary Sackett supporting this kind of an effort. (Page two and highlighted).

/s/ Lyle D. Spencer
Lyle D. Spencer
February 19, 1992

Copies to CLERK, Iowa
Supreme Court & Mr. O'Brien,
Judicial Qualifications Commission

IN THE IOWA DISTRICT COURT
FOR GREENE COUNTY

IN THE MATTER OF THE TRUST UNDER THE WILL OF L.J. SPENCER, Deceased.	Probate No. 8588 ORDER OVERRULING MOTION TO RECONSIDER (Filed Mar. 4, 1992)

****

The motion to reconsider filed by Lyle D. Spencer is OVERRULED.

Attention is directed to Iowa Rule of Civil Procedure 80 as some instruments herein filed by Spencer come dangerously close to requiring imposition of sanctions.

Dated this 3rd day of March, 1992.

BY THE COURT:

/s/ Ronald H. Schechtman
RONALD H. SCHECHTMAN,
Judge of District Court

Clerk to mail copies to:
Michael Thrall
Lyle Spencer

Rehab One, Inc

June 11, 1992

Mr. Steven Hendricks
Kersten & Carlson
805 Central Avenue
Post Office Box 957
Fort Dodge, Iowa 50501-0957

Dear Steve,

I have been advised of the trustee's intention to withdraw as trustee. Harold Spencer would, of course, have no choice but to resist the withdrawal of the corporate trustee until and unless another acceptable corporate trustee could take the trustee's place. Considering the long history of litigation, and whatever the reasons are for the trustee's proposed withdrawal, I expect that it would be difficult or impossible to obtain a new trustee. Nevertheless, Harold will give his full cooperation in efforts to do so if that's what the current trustee prefers.

It seems to me that the time has come for the trustee to bring a motion before the court for a liquidation of the trust into some other assets. Virtually all of the litigation that has arisen in this trust has arisen because of the family's contacts with the farm land. Were the trust kept in Treasury securities, there would be no basis for the litigation. Considering that the litigation has cost the litigants hundreds of thousands of dollars and has imposed a very onerous burden on the trust, and further considering that these parties seem constitutionally unable to avoid litigation, I would expect the court to be agreeable to this proposal.

We first made this proposal a long time ago, and we repeat it at this time because of the trustee's interest in withdrawing. Harold Spencer would strongly support this effort, and I would lend whatever assistance to you that you might request in it. I think it is even possible that Dale and his family would be agreeable.

Please write me and advise me whether the trustee would be willing to take this action at this time.

Very truly yours,

/s/ Scott D. Hillstrom
Scott D. Hillstrom

SDH/dak

cc: Harold Spencer
Michael Thrall, Esq.
Rosemary VanSchooten

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LYLE D. SPENCER, Plaintiff, vs. HAROLD LEE SPENCER, SCOTT HILLSTROM, FIRST AMERICAN STATE BANK, and RONALD SCHECHTMAN	CIVIL NO. C93-3039 AFFIDAVIT FOR DEFAULT

COMES NOW Plaintiff Lyle D. Spencer, pro se, and pursuant to Federal Rule of Civil Procedure 55 (b) (1) moves for Default against Defendants Scott Hillstrom and First American State Bank in the amount of $702,000.00.

Legal Expenses	$68,000.00
Property loss	24,000.00
Business loss	49,000.00
Wrongful obtained judgment	60,000.00
10% interest on judgment	33,000.00

WHEREFORE the Plaintiff prays for judgment by Default triple the above stated actual damages.

Respectfully submitted,

/s/ Lyle D. Spencer
Lyle D. Spencer
7/20/93

Copies to:

Julie F. Pottorff
Hoover Building,
2nd Floor
Des Moines, IA 50319

Scott Hillstrom
Rehab One, Inc.
1550 E. 79th St.
400 Firstar Financial
Center
Bloomington, MN 55425

Michael W. Thrall
1900 Hub Tower
Des Moines, IA 50309

William Gibb
600 Boston Centre
P.O. Box 1396
Ft. Dodge, IA
50501-1396

IN THE UNITED STATES DISTRICT OCURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LYLE D. SPENCER, Plaintiff, vs. HAROLD LEE SPENCER, SCOTT HILLSTROM, FIRST AMERICAN STATE BANK, and RONALD SCHECHTMAN, Defendants.	)	CIVIL NO. C93-3039 HAROLD SPENCER'S MOTION TO DISMISS (Filed June 28, 1993)

COMES NOW the Defendant, Harold L. Spencer, and pursuant to Fed. R. Civ. P. 12 hereby moves to dismiss Plaintiff's Complaint, as amended, and in support thereof states:

1. Lyle D. Spencer, proceeding pro se, brings this action under the provisions of the Racketeer Influenced and Corrupt Oroganizations Act, 18 U.S.C. § 1961, et seq. ("RICO") against his older brother Harold, his brother's attorney during this time, the Fort Dodge Bank serving as the Trustee for the Trust of Harold and Lyle's father, and an Iowa District Court Judge who presided over the trial of the libel action brought by Harold against Lyle and various proceedings related to administration of their father's Trust. Lyle Spencer further asserts a claim against Judge Schechtman under 42 U.S.C. § 1983.

2. Lyle Spencer has failed to state a claim upon which relief can be granted under 18 U.S.C. § 1961, et seq.

3. The RICO claims asserted by Lyle Spencer are barred by the statute of limitations.

4. Lyle Spencer has failed to sufficiently allege a claim under RICO against Harold Spencer, and that claim must be dismissed.

WHEREFORE, Harold L. Spencer respectfully prays that Lyle D. Spencer's Complaint be dismissed at Plaintiff's cost.

/s/ Michael W. Thrall
Michael W. Thrall PK0005603
– of the firm of
NYEMASTER, GOODE,
McLAUGHLIN, VOIGTS,
WEST, HANSELL &
O'BRIEN, P.C.
1900 Hub Tower
Des Moines, Iowa 50309
Telephone: (515) 283-3189
Fax: (515) 283-3108

Attorneys for Defendant
Harold Spencer

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon one of the attorneys of record for each party to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at his/her last known address as shown below, with postage fully paid, and by depositing

said envelope in a United States Post Office depository on the 25th day of June, 1993.

/s/ _____

Lyle D. Spencer
1925 Utah Ave.
Goldfield, Iowa 50542

Scott Hillstrom
Rehab One, Inc.
1550 East 79th Street
400 Firstar Financial Center
Bloomington, Minnesota 55425

IN THE UNITED STATES DISTRICT OCURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LYLE D. SPENCER, Plaintiff, vs. HAROLD LEE SPENCER; SCOTT HILLSTROM; FIRST AMERICAN STATE BANK; and RONALD SCHECHTMAN, Defendants.	CIVIL NO. C93-3039 JOINDER IN MOTION TO DISMISS

COMES NOW the Defendant First American State Bank and joins in the motion to dismiss previously filed by the Defendant Harold L. Spencer, and in support of the motion states:

1. For all the reasons stated in the motion to dismiss filed by Defendant Harold L. Spencer, Plaintiff has also failed to state a claim against this Defendant, First American State Bank.

2. This Defendant joins in the motion to dismiss filed by Defendant Harold L. Spencer, and states that the Plaintiff's complaint is equally deficient in stating a claim against this Defendant.

3. Plaintiff's claims are barred by the statute of limitations. Plaintiff's only claims against this Defendant, First American Stae Bank, (Paragraph 12 and Paragraphs

36-39) all refer to acts committed in 1988 or earlier, more than four years prior to the filing of this action.

WHEREFORE, Defendant First American State Bank joines with Defendant Harold L. Spencer in the motion to dismiss, and PRAYS that Plaintiff's complaint be dismissed, at Plaintiff's costs.

JOHNSON, ERB, GIBB,
BICE & CARLSON, P.C.

By /s/ James L. Kramer
000002970
William S. Gibb
000001813
600 Boston Centre
P. O. Box 1396
Fort Dodge, IA 50501
515/573-2181

ATTORNEYS FOR
DEFENDANT, FIRST
AMERICAN STATE BANK

Copy to:

Lyle D. Spencer
1925 Utah Ave.
Goldfield, IA 50542

Michael W. Thrall, Att'y
1900 Hub Tower
Des Moines, IA 50309

Scott Hillstrom
Rehab One, Inc.
1550 East 79th Street
400 Firstar Financial Center
Bloomington, MN 55425

Hon. Ronald H. Schechtman
Carroll County Courthouse
6th and Main
Carroll, IA 51401

Supreme Court, U.S.
FILED
APR 22 1996
CLERK

No. 95-1673

In The

Supreme Court of the United States

October Term, 1995

LYLE D. SPENCER,

Petitioner,

v.

HAROLD LEE SPENCER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES L. KRAMER
JOHNSON, ERB, BICE, KRAMER GOOD & MULHOLLAND, P.C.
600 Boston Centre
Fort Dodge, Iowa 50501
(515) 573-2181
(Fax) (515) 573-2548

Counsel for Respondent, First American State Bank

April 22, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Because there were pending motions to dismiss, the district court did not abuse its discretion in ordering that discovery be stayed, thus there is no merit to Lyle Spencer's first and fifth questions concerning discovery rulings.

2. Because the complaints against the state court judge concerned actions within the scope of judicial duties, the state court judge was absolutely immune from suit and there is no basis for the second question.

3. Because plaintiff, Lyle Spencer, neither complied with the requirements of Fed. R. Civ. P. 4(c)(2)(C)(ii), nor attempted any other service upon First American State Bank and because First American State Bank had moved to dismiss prior to Spencer moving for default, there is no basis for Lyle Spencer's third and fourth questions regarding default, issues which were never reached by the district court.

RULE 29.1 STATEMENT

First American State Bank, located in Fort Dodge, Iowa is an Iowa Banking Corporation with its principal place of business in Fort Dodge, Iowa, and an office in Dayton, Iowa. Its corporate name has been changed to First American Bank. First American Bank does not have any subsidiaries. First American Bank is a wholly owned subsidiary of First American Bank Group, Ltd., an Iowa bank holding company. First American Bank Group, Ltd. has the following other subsidiaries: First American Bank located in Webster City, Iowa; First American Bank located in Ames, Iowa and with offices in Roland, Jewell and Ellsworth, Iowa and First American Credit Corporation located in Fort Dodge, Iowa.

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   B. The complaint did not identify an "enterprise" that had some ascertainable structure distinct from the "pattern or racketeering" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*..... 7

   C. The complaint did not allege acts of "racketeering activity" within the intent and scope of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* 10

2. Because the complaints against the state court judge concerned actions within the scope of judicial duties, the state court judge was absolutely immune from suit and there is no basis for the second question..... 11

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3. Because Plaintiff, Lyle Spencer, neither complied with the requirements of Fed. R. Civ. P. 4(c)(2)(C)(ii), nor attempted any other service upon First American State Bank and because First American State Bank had moved to dismiss prior to Spencer moving for default, there is no basis for Lyle Spencer's third and fourth questions regarding default, issues which were never reached by the district court 12

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INTRODUCTION

Lyle Spencer's numerous complaints[1] about his relationship with his brother, Harold Spencer, and about actions taken by First American State Bank, trustee of the trust established under his father's will, do not state a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq*. Specifically, the complaint failed to identify any "enterprise" that has some ascertainable structure distinct from that inherent in a pattern of racketeering. Further, the acts alleged in the complaint were not "racketeering activity" within the intent and scope of the RICO Act. Dismissal of the complaint was proper.

As motions to dismiss were pending, the magistrate's order staying discovery pending ruling on the motions to dismiss was proper. For purposes of the motions, all of the allegations of the complaint were assumed to be true, thus there was no need to "prove" the allegations through discovery.

First American State Bank had never been served. It joined in the motions to dismiss prior to any request for default. There was no factual or legal basis for default. The trial court did not even reach the issue as the complaint was so patently deficient.

The trial court correctly dismissed Lyle Spencer's RICO complaint. The Eighth Circuit affirmed without opinion. Certiorari should be denied as the case presents neither error nor grounds for review.

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[1] First American State Bank does not admit that there is any factual basis for the claims made in Lyle Spencer's complaint.

STATEMENT

Lyle D. Spencer, acting *pro se*, filed his complaint against his brother, Harold Lee Spencer, and Harold's attorney, Scott Hillstrom. Also sued was First American State Bank (hereinafter the "trustee"), the trustee of the trust established under the will of Lyle's and Harold's father. The principal asset of the trust was the father's farmland. Lyle also sued the Honorable Ronald Schechtman, Chief Judge of the Second Judicial District of Iowa, who had presided over a trial in which Harold had recovered judgment against Lyle for libel[2] and various proceedings involving the trust. Lyle attempted, but failed to allege claims for recovery under the provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*

The specific allegations against the trustee are contained in Paragraphs 12-14 and 36-38 of the complaint. Lyle Spencer's complaint concerns matters between the years 1985 and 1988. He alleged, in Paragraph 12, that the trustee sought to harass and intimidate Lyle in order to wrongfully obtain concessions from him in order to ruin him and force him from the land. He alleged, in Paragraph 13, that his lease was terminated by the trustee; and in Paragraph 14, that after five or six months of uncertainty he was allowed to stay on the land and new leases were issued in December of 1988. In Paragraph 36, he alleged that the trust officer demanded that Lyle either pay rent on farm improvements which he had built out of

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[2] See *Spencer v. Spencer*, 479 N.W.2d 293 (Iowa 1991).

his own savings or that the farm lease would be terminated and that the lease was, in fact, terminated in violation of a court order. He claimed that this constituted an act of extortion. In Paragraph 37, Lyle claimed that the trustee attempted to obtain money under false pretenses by charging nearly $4,000 to the trust for farm management services. In Paragraph 38, he alleged that the trust's attorneys informed him that cash rent would be waived if a farm manager could be employed. The farm manager would cost the trust $13,500 a year. Attached to the petition were certain exhibits, including a notice of termination of farm tenancy to Lyle and Kathy Spencer issued in 1988 and a fee request for trust services submitted in March of 1989. None of these allegations are admitted by the trustee.

Summons were issued on June 14, 1993. Actual service was never attempted. Lyle attempted to obtain service over the trustee by mailing under Rule 4(c)(2)(C)(ii), Fed. R. Civ. P. He did not follow the rule as (1) he did not include in the mailing the required two copies of the notice, (2) he did not include any acknowledgments in his mailing to the trustee, nor (3) did he enclose any return envelope.

Harold Spencer filed a motion to dismiss challenging the sufficiency of Lyle's allegations to state a claim for a violation of RICO and claiming that the suit was barred by the statute of limitations. Even though no service had been perfected, the trustee, on July 19, 1993, filed its joinder in the motion to dismiss. Lyle moved for default against the trustee on July 23, 1993. The trustee resisted the motion on the grounds that the attempted service was

ineffective and had not conferred jurisdiction over the trustee.

Lyle sent discovery requests to the Defendants. All Defendants moved for protective orders requesting that discovery be stayed until after a ruling was entered upon the motions to dismiss. Magistrate Jarvey granted this relief on November 22, 1993.

The motions to dismiss for failure to state a claim for relief were submitted to Senior Judge Donald E. O'Brien on February 3, 1994. In addition to the oral and written argument, the court went to extraordinary lengths to accommodate Lyle Spencer's attempt to state a claim, including allowing him to file additional documents and exhibits in support of his claims and to call as many witnesses as he might choose to offer testimony in support of his claims.

Judge O'Brien reviewed Lyle's complaints over the handling of the court-supervised trust, the events that led to the libel judgment against Lyle, and his brother's efforts to collect the judgment. The district court concluded that Lyle had not plead the existence of an "enterprise" sufficient to make a claim under the RICO statute. No factual basis for the existence of an enterprise, separate and apart from the pattern of racketeering activity was alleged. The complaint failed to identify any "enterprise" that has some ascertainable structure distinct from that inherent in a pattern of racketeering. Further, the district court concluded that the alleged acts were not "racketeering activity" within the intent and scope of the RICO Act. The court did not reach the issue of whether

the claims were barred by the statute of limitations contained in the act. As no claim had been stated against any of the Defendants, the court ruled that the motion for default and the objections to the protective order were moot. As to Judge Schechtman, judicial immunity also applied.[3]

Judge O'Brien ruled, in part –

> "The court has reviewed plaintiff's papers at great length and has considered the arguments of the parties. The court is persuaded that as a matter of law, plaintiff's allegations, even when taken as true, are insufficient to maintain a RICO claim against these defendants. The plaintiff has not properly alleged an 'enterprise' for the purposes of RICO and further, the acts allegedly taken by the defendants do not constitute 'racketeering activity' as that term is defined in the RICO statutes."

Petition. App. D, p. 15.

Lyle moved the district court to reconsider the dismissal and offered whatever additional information and documents which he believed supported his claims. He also filed motions to amend, for costs, for contempt of court, and to strike a document. After another lengthy hearing, the trial court issued its order of November 23, 1994 denying Lyle's motions. None of Lyle's filings presented any reason for the district court to change the

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[3] For the purpose of the motion to dismiss and this appeal, Lyle Spencer's allegations, no matter how groundless, are to be treated as though they are factual. The trustee, First American State Bank, specifically denies that there is any factual basis for any of the claims of wrongdoing asserted against it.

order for dismissal. All of his "new evidence" had been considered in the prior order. Pet. App. C, pp. 5-6.

Lyle Spencer appealed. The Eighth Circuit affirmed without opinion. Lyle Spencer's Motion for Rehearing was also denied.

REASONS FOR DENYING THE WRIT

1. Because there were pending motions to dismiss, the district court did not abuse its discretion in ordering that discovery be stayed, thus there is no merit to Lyle's first and fifth questions concerning discovery rulings.

A. When motions to dismiss were pending, the trial court had discretion to stay discovery on the merits of the claims until a ruling was made upon the motions to dismiss.

Lyle Spencer had filed rambling interrogatories and request for production of documents which were intended to harass the defendants. For an example see SA1-SA3.[4] As all of the Defendants had moved to dismiss the complaint for failure to state a claim for relief, all of the allegations were assumed, for the purpose of the motions, to be true and correct. Thus, there was no need for Lyle Spencer to use discovery to "prove" his allegations.

Each of the Defendants sought protective orders from responding to the discovery until after a ruling on the

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[4] Citations to the Appendix to the petition will be styled "Petition. App. ___." Citations to the attached Supplemental Appendix will be styled "SA___."

motions to dismiss. The magistrate correctly sustained the motions for protective orders and ordered that no discovery shall be had until after rulings have been entered on defendants' motions to dismiss. SA4-SA6. The magistrate had discretion to make this order under Rule 26(c), Fed. R. Civ. P. The ruling was correct and did not prejudice Lyle Spencer's ability to respond to the motion to dismiss.

B. The complaint did not identify an "enterprise" that had some ascertainable structure distinct from the "pattern or racketeering" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*

The only common thread connecting the Defendants was their interest in the trust established under the will of Lyle and Harold Spencer's father. Lyle and Harold, along with other members of their family, were beneficiaries of the trust. Hillstrom was Harold's lawyer. First American State Bank had succeeded Harold as trustee. The brothers were usually at odds over the trust management. Often their disputes could only be resolved through recourse to the courts, either through the state probate court's supervision of the trust or otherwise. Judge Schechtman had ruled on matters relating to the trust. When the ill-will between the brothers boiled over into the libel suit, Judge Schechtman presided over the trial.

Lyle's loss of that suit, the judgment against him, and Harold's unrelenting collection efforts (undertaken by his attorney, Hillstrom) only worsened Lyle's sense of victimization. He blamed everyone else for his difficulties. Hence, Lyle commenced this RICO suit which sought to

revisit the same disputes that had been decided against him in state court. The allegations of Lyle's complaint, the exhibits attached to the complaint, Lyle's pleadings, his evidence and testimony at the various hearings all document Lyle's belief that these Defendants were conspiring against him. Lyle may genuinely believe that he has suffered the slings and arrows of outrageous fortune. His personal tragedy may be the stuff of theater; it does not present a claim for relief under RICO.

The trustee's unfortunate tie to Lyle's frustration over his father's trust does not constitute an "enterprise" under RICO. Congress enacted the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* to prevent organized crime from infiltrating businesses and other legitimate economic entities. *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 2532, 69 L.Ed.2d 264 (1981). It was not directed to mere criminal conduct, not even to joint criminal conduct, but to "organized" crime.

The district court correctly dismissed Lyle's complaint as he failed to allege the existence of an enterprise under RICO as stated in *Stephens, Inc. v. Geldermann, Inc.*, 962 F.2d 808, 815 (8th Cir. 1992):

> "The essential characteristics of an Enterprise under RICO include: '(1) a common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that inherent in a pattern of racketeering.' *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989) (citing *United States v. Kragness*, 830 F.2d 842, 855 (8th Cir. 1987)). In particular, 'an enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association

> which surrounds these acts.' *United States v. Bledsoe*, 674 F.2d 647, 664 (8th Cir.), *cert. denied*, 459 U.S. 1040, 103 S.Ct. 456, 74 L.Ed.2d 608 (1982)."

Stephens held that the group of defendants –

> " . . . had no structure independent of the alleged racketeering activity. The only common factor that linked all these parties together and defined them as a distinct group was their direct or indirect participation in Markle's scheme to defraud Stephens. Although it is true that each member of this group carried on other legitimate activities, these activities were not in furtherance of the common or shared purpose of the enterprise and, thus, were not acts of the enterprise. Stephens, consequently, failed to prove the existence of an enterprise that extended beyond the minimal association surrounding the pattern of racketeering activity."

Id., pp. 815-16.

The trial court correctly came to the same conclusion in this case. Lyle's accusations, even when accepted as factual, did not indicate the existence of an enterprise that extended beyond the minimal association created by Defendant's mutual involvement in the administration of the trust. Even if there were wrongdoing, no claim under RICO was presented either under the complaint or Lyle's claims as amplified by his exhibits, documents, testimony, pleadings and arguments.

The dismissal of Lyle Spencer's RICO complaint was required. The dismissal was affirmed. There is no basis for a grant of *certiorari*.

C. The complaint did not allege acts of "racketeering activity" within the intent and scope of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*

The acts alleged in Lyle Spencer's complaint all relate to instances where he has not had his own way in matters relating to the trust established under his father's will. Lyle appears to see anyone who disagrees with him as not only wrong, but criminal. Lyle sees conspiracies all around him. Lyle accuses the Defendants and their associates of "interstate drug trafficking" and "a host of crimes with bribery, extortion, and dealing in dangerous drugs."

Despite all his invective, Lyle has been unable to allege facts demonstrating a pattern of racketeering activity as listed in the RICO Act, 18 U.S.C. § 1961(1). The district court thoroughly reviewed Lyle's claims and correctly concluded that none fit the definition of "racketeering activity" as required by the above statute.

To prove a pattern of racketeering activity Lyle Spencer "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *H. J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 109 S.Ct. 2893, 2900, 106 L.Ed.2d 195 (1989); *see also Pavlik v. Cargill, Inc.*, 9 F.3d 710 (8th Cir. 1993).

The circuit had observed in *Thornton v. First State Bank of Joplin*, 4 F.3d 650, 652 (8th Cir. 1993):

> "RICO defines a 'pattern of racketeering activity' as at least two acts of racketeering activity, 'one of which occurred after [RICO was enacted]

> and the last of which occurred within 10 years . . . after the commission of a prior act of racketeering activity.' 18 U.S.C. s 1961(5). The United States Supreme Court has further provided: RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. *H. J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 109 S.Ct. 2893, 2900, 106 L.Ed.2d 195 (1989)."

The district court gave Lyle Spencer every opportunity to state a claim. Dismissal of Lyle Spencer's complaint was required. There is no basis for grant of *certiorari*.

2. Because the complaints against the state court judge concerned actions within the scope of judicial duties, the state court judge was absolutely immune from suit and there is no basis for the second question.

Lyle Spencer claimed that Judge Schechtman, who presided over the libel suit, had fraternized with Iowa Supreme Court Justice Harris, a witness in the case and that Judge Schechtman had later threatened Spencer with sanctions and had entered illegal, *ex parte* orders. Assuming that these claims were true, the conduct fell within the scope of judicial duties. Thus, even if the judge acted maliciously and corruptly, he was absolutely immune from suit. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213 (1967); *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099 (1978).

3. **Because Plaintiff, Lyle Spencer, neither complied with the requirements of Fed. R. Civ. P. 4(c)(2)(C)(ii), nor attempted any other service upon First American State Bank and because First American State Bank had moved to dismiss prior to Spencer moving for default, there is no basis for Lyle Spencer's third and fourth questions regarding default, issues which were never reached by the district court.**

The district court never reached the issue of whether the trustee could be in default where service had never been accomplished. As the complaint failed to make a claim upon which relief could be granted, it was not necessary for the court to rule upon Lyle Spencer's motion for default.

A. Plaintiff failed to make effective service of process by mailing.

Lyle Spencer attempted to serve process concerning this action on the trustee, First American State Bank, under Fed. R. Civ. P. 4(c)(2)(C)(ii). This rule allows a party to serve process on a defendant by ordinary mail if certain requirements are met. The rule provides that when the defendant to be served is a corporation, service of the summons and complaint may be accomplished:

> "by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return

> envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3)." Fed. R. Civ. P. 4(c)(2)(C)(ii).

Although Lyle Spencer sent a copy of the summons and of the complaint to the trustee, he failed to send two copies of a notice and acknowledgment that conformed substantially to form 18-A and a return envelope, postage prepaid, addressed to Plaintiff. Instead, Plaintiff included only one copy of a document similar to a proper notice and acknowledgment, without the acknowledgment portion of the document. Plaintiff also failed to include a return envelope, postage prepaid, addressed to Plaintiff.

Due to Plaintiff's failure to properly comply with the requirements for mailing of service under Rule 4(c)(2)(C)(ii), Defendant First American State Bank had no obligation to return an acknowledgment of service. In the absence of an acknowledgment, no service is obtained by mailing under this rule. In order to make effective service, Plaintiff was required to serve the summons and complaint by personal or substituted service under Rule 4(d)(1) or (3). Plaintiff failed to make such service by other means.

In *Gulley v. Mayo Foundation*, 886 F.2d 161, 165 (8th Cir. 1989), the plaintiff argued that the defendant's signing of a postal service return receipt satisfied the requirement that service be acknowledged. The court held that "the provisions of Rule 4(c)(2)(C)(ii) are to be strictly complied with and that, therefore, if the acknowledgment form is not returned, the formal requirements of mail service are not met and personal service must be obtained." *Id.* (quoting *Young v. Mount Hawley Insurance Co.*, 864 F.2d 81, 82-83 (8th Cir. 1988)).

Similarly, the Ninth Circuit has held that, under Rule 4(c)(2)(C)(ii), service is ineffective unless the defendant timely returns the acknowledgment. *Mason v. Genisco Technology Corp.*, 960 F.2d 849 (9th Cir. 1992). If the defendant fails to return the acknowledgment, the plaintiff must attempt follow-up service by some other method, in order to make the service effective, even if defendant receives actual notice by mail. *Id.*

First American's signing of the postal service return receipt cannot be considered an acknowledgment of service under *Gulley* and *Mason*. Plaintiff must obtain personal service on Defendant First American State Bank in order to make effective service of process. Plaintiff has failed to make such service. No effective service has even been made on Defendant First American State Bank.

B. A default may not be entered against a party unless the requirements for effective service have been satisfied.

The trustee, First American State Bank, was never effectively served. The defects in the attempted service

were identified in the preceding argument. Absent service, there is no jurisdiction and can be no default. Only if there is service can the two-step process leading to a default judgment commence. The first step is the entry of default. Fed. R. Civ. P. 55(a). The second step is entry of the actual judgment by default.

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

Fed. R. Civ. P. 55(a).

The words "plead or otherwise defend" relate to the provisions of Rule 12, which, in general, requires the defendant to present his defenses in an answer served within 20 days of the date on which he was served with process, but permits the raising of certain defenses by motion, at the option of the pleader. If a party has not been served, there is nothing by which to measure the appropriate time period for "plead[ing] or otherwise defend[ing]." James W. Moore, *Moore's Federal Practice*, ¶ 55.03[1] (2d ed. 1991).

Lyle claims the trustee was late in filing its response to his complaint. However, as the trustee was never effectively served with the complaint, it had no obligation to file any pleading. The trustee could not have been late in filing a response to the complaint.

A court does not have jurisdiction to enter judgment against a defaulting defendant unless effective process has been served on the defendant. *Harris v. Hardeman*, 14

How. 334, 55 U.S. 334, 14 L.Ed. 444 (1852). *See also, Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946); *Combs v. Nick Garin Trucking*, 825 F.2d 437, 442 (D.C. Cir. 1987) (service of process is the means by which a court asserts jurisdiction to adjudicate the rights of a party). Consequently, since Spencer failed to serve effective process on the trustee, the court did not have jurisdiction to enter a default judgment against the trustee, First American State Bank.

CONCLUSION

The Petition for Certiorari is without merit. There was no error in the district court's determination that Lyle Spencer's complaint failed to state a claim under RICO. As all of his complaints were accepted at face value by the district court in ruling upon the motions to dismiss, there was neither abuse of discretion nor prejudice in the order which stayed discovery. The state court judge was absolutely immune from liability for his actions in the scope of his judicial duties. The trustee, First American State Bank, had not been served and was not in default. The dismissal of Lyle Spencer's complaint was proper. Certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents – First American State Bank

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LYLE D. SPENCER, Plaintiff, vs. HAROLD LEE SPENCER, SCOTT HILLSTROM, FIRST AMERICAN STATE BANK, and RONALD SCHECHTMAN, Defendants.	) CIVIL NO. C 93-3039)) FIRST SET OF) INTERROGATORIES) FOR DEFENDANT) FIRST AMERICAN) STATE BANK)))

TO: Defendant, First American State Bank of Fort Dodge Iowa, and their attorneys of record, William Gibb of the Johnson, Erb, and Gibb Law Firm, 600 Boston Center, P.O. Box 1396, Fort Dodge, IA 50501-1396.

On this 1st day of October, 1993, Federal Plaintiff Lyle D. Spencer requests, pursuant to Federal Rules of Civil Procedure, that within thirty (30) days Defendant answer the following Interrogatories.

/s/ Lyle D. Spencer, pro se
Lyle D. Spencer, Pro se

INTERROGATORY 1 – Federal Defendant First American State Bank was selected to serve as Trustee for the Spencer Trust by Defendants Harold Lee Spencer and Scott Hillstrom almost a decade ago. Through the years documents prove that First American has tried to please

or award favoritism's to Defendant Harold Spencer. Why is this so?

* * *

INTERROGATORY 13 – Because of the conspiracy linking Defendant Harold Spencer and Defendant First American in the termination of Lyle Spencer's lease, he, Plaintiff Lyle Spencer Tried to defend himself by writing letters to the Trustee, Defendant First American State Bank, telling them to stop listening to Harold Spencer because he was a trouble maker, a liar, a cheat, and worse. Copies of the letters went to all those associated with the trust in the past and present. Copies were also designated, but not sent to newspapers and public officials, not to expose Harold as he claimed, but to draw attention to corruption in the State Courts, a fact agreed with by Justice Rosemary Sackett. (ex partes & etc.) As soon as Defendant Harold Spencer relinquished his charges in the Annual Report of 1988 and Lyle Spencer and his wife were given a farm lease, Defendant Spencer and Defendant Scott Hillstrom sued the Plaintiff for $1,000,000.00. Please give reasons why Defendant First American should not be responsible for planting the seeds that caused this lawsuit?

INTERROGATORY 14 – Once in Green County District Court, Defendant Harold Spencer put his long time personal friend, Justice David Harris on the stand at which time Mr. Harris illegally used the prestige of the Supreme Court, coached by his close relative, Defendant Scott Hillstrom, to convince his mostly hometown Jury, that Harold Spencer was an angel. Harris's testimony was accompanied by testimony of lawyers, Doctors, bankers,

and wealthy businessmen. Lyle Spencer had just one main witness, Kenny Robbins, Harold Spencer's neighbor for 35 years, who told the Jury that Harold was indeed a thief and had worked for Harold when he saw him steal grain from his land lady, one Mrs. Garland. Still the Jury, mostly on the weight of Defendant Harold Spencer's prestigious witnesses, granted him $60,000 at 10 int. for his suffering of emotional distress. With all the information at hand from this Interrogatory and others, it appears that first American is guilty of the existence of an enterprise affecting interstate commerce with their constant work with Defendant Scott Hillstrom. First American was defiantly employed or associated with this enterprise. First American participated in the contact of this enterprise's affairs and it is obvious that the participation was through a pattern of racketeering activity. My question is give reasons why would not Defendant First American State Bank qualify under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. S 1961, et seq.?

INTERROGATORY 15 – Is it true that presently, Defendant First American State Bank, is entertaining the demands of Defendant Harold Lee Spencer in his $68,000 farm improvement plan for the Trust farm his son operates?

/s/ Lyle D. Spencer, pro se
Lyle D. Spencer, pro se

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C93-3039

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LYLE D. SPENCER, Plaintiff, vs. HAROLD LEE SPENCER, SCOTT HILLSTROM, FIRST AMERICAN STATE BANK, and RONALD SCHECHTMAN, Defendants.	)	NO. C 93-3039 ORDER (Filed Nov. 22, 1993)

This matter comes before the court pursuant to defendant Harold Lee Spencer's October 20, 1993, motion for protective order (docket number 39) and his November 8, 1993, amended and substituted motion for protective order (docket number 47); defendant Judge Ronald Schechtman's October 27, 1993, motion for protective order (docket number 41) and his November 4, 1993, amended motion for protective order and request for immediate ruling (docket number 44); and November 1, 1993, motion for protective order (docket number 43) and his November 5, 1993, amended and substituted motion for protective order (docket number 46). Plaintiff Lyle D. Spencer has resisted all motions *pro se*. All motions are granted in part.

Plaintiff Lyle D. Spencer filed this action against his elder brother, defendant Harold Lee Spencer, Harold Spencer's sometime attorney, the corporate trustee of a

family trust involved in this litigation, and the state court judge who issued various rulings in prior proceedings between the Spencers involving the family trust and other matters. Lyle Spencer has served various discovery requests upon the defendants, including interrogatories, requests for production of documents, and requests for admissions. All defendants have moved for protective orders against these discovery requests. Judge Schechtman seeks a protective order on the grounds of absolute judicial immunity. The other defendants have moved for protective orders on the grounds that the plaintiff's suit is frivolous, and that the discovery requests are burdensome, expensive, and intended to annoy and harass the defendants.

All defendants have also moved to dismiss this action as failing to state a claim upon which relieve can be granted. Rulings on those motions are pending before the Honorable Judge Donald E. O'Brien. The court concludes that discovery should be stayed until rulings have been entered on whether this suit should be dismissed. The appropriateness of plaintiff's discovery requests may then be assessed in light of their relevancy to whatever issues, if any, remain.

Upon the foregoing,

IT IS ORDERED

That all motions for protective orders are granted to the extent that no discovery shall be had until after

rulings have been entered on defendants' motions to dismiss.

November 22, 1993.

/s/ John A. Jarvey
JOHN A. JARVEY
Chief Magistrate Judge
UNITED STATES DISTRICT COURT

Copies mailed on NOV 22 1993
to counsel of record or pro se
parties as shown on the docket
sheet.

/s/ M. Jackle
Deputy Clerk